Supreme Court, U.S.
FILED
OCT 20 1993
OFFICE OF THE CLERK

93-650

No. 93-___

In The

Supreme Court of the United States

October Term, 1993

STEVEN R. HOLLAND and GLENNYSS E. HOLLAND, husband and wife,

Petitioners,

v.

JOHN DEERE CO., a Delaware corporation; and FOUR COUNTY TRACTOR EQUIPMENT CO., a Texas corporation,

Respondents,

v.

DEERE & COMPANY,

Additional Party-Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

SANDRA L. TOLLIVER
Substitute Counsel on behalf of
MORRIS & MORRIS
1616 South Denver
Tulsa, Oklahoma 74119
(918) 587-5514

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the district court in a summary judgment proceeding can reach conclusory inferences in favor of the party moving for summary judgment based solely upon the deposition testimony of the nonmoving party and rely on those inferences in granting summary judgment.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTES 2

STATEMENT OF THE CASE 2

Proceedings in the Courts Below 2

Facts 4

ARGUMENT 8

A. INTRODUCTION 8

B. UNDER THE GENERAL PRINCIPLES GOVERNING SUMMARY JUDGMENTS, A DISTRICT COURT SHOULD NOT BE ABLE TO REACH CONCLUSORY INFERENCES DRAWN FROM A NONMOVING PARTY'S OWN DEPOSITION TESTIMONY WHICH FAVOR OF THE PARTY MOVING FOR SUMMARY JUDGMENT 8

C. EXISTING FEDERAL CASE LAW INTERPRETING THE SUMMARY JUDGMENT STANDARD 13

CONCLUSION 17

APPENDIX:

Order and Judgment of the United States Court of Appeals for the Tenth Circuit dated June 28, 1993 ..... 1A

TABLE OF CONTENTS— Continued

Page

Memorandum Opinion and Order of the United States District Court for the Western District of Oklahoma dated May 20, 1992 ..... 11A

Judgment of the United States District Court for the Western District of Oklahoma dated May 20, 1992 ..... 26A

Order of the United States District Court for the Western District of Oklahoma dated July 29, 1992 ..... 28A

TABLE OF AUTHORITIES

Page

CASES

Adickes v. Kress & Co., 398 U.S. 144 (1970).....14, 15

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 14, 15

Barber v. General Electric Co., 648 F.2d 1272 (10th Cir. 1981) 10

Board of Education v. Pico, 457 U.S. 853 (1982) 9

Braxton-Secret v. A.H. Robins Co., 769 F.2d 528 (9th Cir. 1985) 12

Burden v. U.S. Army Corps of Engineers, 794 F. Supp. 184 (S.D.W.Va. 1992) 8

Dayton Hudson Corp. v. Macerich Real Estate Co., 812 F.2d 1319 (10th Cir. 1987).....9, 11

Ercole v. K/S Difko, XLIII Kodif KLIII A.p.S., 793 F. Supp. 61 (E.D.N.Y. 1992)..... 8

Franklin Nat. Bank v. Krakow, 295 F. Supp. 910 (D.C.D.C. 1969)..... 15

Freund v. Fleetwood Enterprises, Inc., 756 F. Supp. 604 (D. Me. 1991) 11

Groff v. Continental Ins. Co., 741 F. Supp. 541 (E.D. Pa. 1990)..... 8

Harsha v. U.S., 590 F.2d 884 (10th Cir. 1979)..... 15

Hawkins v. Larrance Tank Corp., 555 P.2d 91 (Okla. App. 1976) 13

Jordan v. General Motors Co., 590 P.2d 193 (Okla. 1979)..... 13

TABLE OF AUTHORITIES – Continued

Page

Kirkland v. General Motors Corp., 521 P.2d 1353, 1366 (Okla. 1974) 10

Mills v. Mills, 790 F. Supp. 172 (S.D. Ohio 1992) 9

Powers v. Nassau Development Corp., 753 F.2d 457 (5th Cir. 1985) 9

Ross v. Wal-Mart Stores, Inc., 730 F. Supp. 357 (D. Kan. 1990) 12

Savarin Corp. v. National Bank of Pakistan, 290 F. Supp. 285 (S.D.N.Y. 1968) 16

Tenax Corp. v. Tensar Corp., 743 F. Supp. 1204 (D. Md. 1990) 12

United Indus. Corp. v. Nuclear Corp. of America, 43 F.R.D. 30 (D.C.N.Y. 1967) 15

United Food and Commercial Workers Union Local No. 88, AFL-CIO, CLC v. Middendorf Meat Co., 794 F. Supp. 328 (E.D. Mo. 1992) 9

United States v. Diebold, Inc., 369 U.S. 654 (1962) 15

Van Poyck v. Dugger, 779 F. Supp. 571 (M.D. Fla. 1991) 12

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1332 4

TABLE OF AUTHORITIES – Continued

Page

RULES

Fed. R. App. 4(a) 4

Local Rule 14(b) of the Rules for the Western District of Oklahoma 11

Rule 56 of the Federal Rules of Civil Procedure (2d ed 1983) 2, 10

OTHER

10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* 12

OPINIONS BELOW

The opinion of the United States Court of Appeals is unpublished and is reproduced in the Appendix (hereinafter "App.") at 1A - 10A. The Memorandum Opinion and Order of the United States District Court for the Western District of Oklahoma dated May 20, 1992, is unpublished and is reproduced in App. 11A - 25A. The judgment of the United States District Court dated May 20, 1992, is reproduced in App. 26A - 27A. The Order denying plaintiffs' Motion for New Trial or to Reconsider is dated July 29, 1992, and is reproduced in App. 28A - 29A.

JURISDICTION

On June 28, 1993, the United States Court of Appeals affirmed the judgment of the United States District Court for the Western District of Oklahoma thereby upholding the granting of the defendants' Motion for Summary Judgment and upholding the denial of the plaintiffs' Motion for New Trial or Motion to Reconsider.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). On September 15, 1993, this Honorable Court granted petitioners an extension of time to file this Writ until October 26, 1993.

STATUTES

Rule 56 of the Federal Rules of Civil Procedure

Rule 56. Summary Judgment

(c) Motion and Proceedings Thereon. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE
Proceedings in the Courts Below

Petitioners Steven R. Holland and Glennyss E. Holland, husband and wife, brought this action on June 27, 1991, seeking compensation for Steven R. Holland's personal injuries and Glennyss E. Holland's loss of consortium alleging that while checking the electrical system and standing beside a John Deere tractor, Model 4440, the tractor suddenly, and without warning, spontaneously started, causing the tractor to run over petitioner, Steven R. Holland, resulting in severe permanent and disabling injuries. Petitioners alleged that the Deere tractor was defective and unreasonably dangerous in its design and manufacture; that the defective design and manufacture were the proximate cause of the injuries to petitioner; that the defects made the product dangerous beyond that ordinarily contemplated by users of the equipment such as petitioner; and that the respondents failed to warn the public or petitioner. Respondent Four County Tractor Equipment Co. filed its Answer on July 15, 1991, denying petitioners' allegations and asserting affirmative defenses, including misuse of the product, knowledge of risk and

assumption of same, and negligence of petitioner. Respondent John Deere Company filed its Answer on July 22, 1991, denying petitioners' allegations and asserting affirmative defenses, including modification of the product, negligence of petitioner and misuse of the product.

On February 21, 1992, petitioners moved to add Deere & Co. as an additional party defendant. The district court entered an Order granting the addition of Deere & Co. as a party defendant on February 25, 1992. Petitioners filed an Amended Complaint on March 3, 1992. Deere & Company and John Deere Co. filed their Answers to petitioners' Amended Complaint on March 24, 1992.

Respondent Four County Tractor filed its Motion for Summary Judgment on March 2, 1992, alleging that the product was not the cause of petitioner's injury, that the product was not defective when it left the manufacturer's possession and control, that the defect was not unreasonably dangerous to petitioner, and that petitioner was adequately warned. Petitioners responded on April 6, 1992, and respondent Four County Tractor replied on April 8, 1992. Petitioners supplemented their response on April 30, 1992.

On May 20, 1992, the district court granted respondent's Motion for Summary Judgment and entered judgment in favor of Four County Tractor and, sua sponte, John Deere Co. and Deere & Company. Petitioners filed a Motion for New Trial or in the alternative Motion to Reconsider on June 1, 1992. Petitioners also filed an Application for Enlargement of Time to File the Affidavit of Dr. Robert P. Walson in Support of Their Motion for New Trial or Motion to Reconsider on July 28, 1992. The

Court denied the Motion for New Trial and the Application on July 29, 1992.

Petitioners appealed from the granting of respondent's Motion for Summary Judgment, the denial of petitioner's Motion for New Trial or in the alternative Motion to Reconsider and the denial of petitioner's Application for Enlargement of Time to File the Affidavit of Dr. Robert P. Walson. Petitioners filed their timely notice of appeal on August 24, 1992, and commenced their appeal to the Tenth Circuit Court of Appeals pursuant to Fed. R. App. 4(a). The jurisdiction of the district court arose from petitioners' manufacturer's products liability claim brought pursuant to the common law of the State of Oklahoma and was founded on 28 U.S.C. § 1332.

Facts

Petitioner Steven R. Holland testified in his deposition that he grew up on a family farm. He was around tractors growing up and drove every one of his father's tractors. He started driving tractors around the age of 12 or 13. Petitioner's father gave him safety lessons and petitioner understood that he had to be careful around tractors.

Petitioner testified that he has owned around six tractors himself. He purchased the subject tractor from Four County Equipment Co. in 1980 or 1981. He read the owner's manuals on the tractors that he purchased. He performed small maintenance on his tractors, including changing the alternator, cleaning the battery connections, and changing the front wheel bearings, but he took the tractors to a John Deere authorized service center for other work on them. For example, he took the subject

tractor back to Four County Equipment Co. for repair in 1982 when the rear end went out. Petitioner performed about ninety percent (90%) of repairs on his other equipment. He has owned cotton strippers, cotton trailers, offset disks, tandem disks, drills, bale.s, swathers and grinders.

Petitioner testified that he replaced the bolts on the starter solenoid of the subject tractor twice before the accident when they broke when taking off the cotton stripper. To replace the solenoid bolts, petitioner took the entire starter solenoid off of the tractor, then took off the two bolts off at the end of the solenoid, and pulled out the broken solenoid bolt. He disconnected the battery prior to removing the starter solenoid from the tractor. Petitioner agreed that it is a safe practice to always disconnect the battery cable before working on the electrical system of a tractor.

Petitioner testified that the solenoid bolt on the subject tractor broke off partially in the winter of 1989 before his accident on August 22, 1989, when he was taking a cotton stripper off of the tractor, but that there were still enough threads left on the bolt that it worked fine. On the morning of August 22, 1989, petitioner put the post hole diggers on the subject tractor to dig post holes and the tractor would not start. Petitioner loosened the nut on the top solenoid bolt and the bolt broke and the nut would not go back on the broken bolt. He scraped the main battery cable and the two small wires that hooked to the solenoid. Petitioner then attempted to start the tractor by putting the wires together. He held the battery cables and the two wire connections onto the top bolt stub on the starter solenoid cap. The tractor started and the wires

stayed in place and the tractor started every time that day except at seven o'clock that night.

Petitioner testified that on August 22, 1989, at approximately seven o'clock p.m., he had just returned to the accident site with a load of fence posts to put into the ground. He got in the driver's seat of the tractor and attempted to start the tractor with the key. The tractor would not start. Petitioner assumed that the cables had come loose from the starter solenoid. He put the cables back on the starter solenoid cap like he had done that same morning to start the tractor. He reached up into the tractor and turned the key to start the tractor and the tractor did not make a sound. Petitioner does not specifically recall whether he checked the gearshift to make certain whether the tractor was in park.

Petitioner testified that he then took metal pliers out of his pocket and reached in with the pliers to loosen or take the nut off of the bottom solenoid bolt to clean the battery connection, a procedure he has had to do often on tractors. The last thing he remembers is coming up with the pliers in his hand. He does not remember why the tractor started. When the tractor started, it did not stall, but started in a full gallop and rolled over on top of petitioner, causing him severe crushing injuries.

Petitioner testified that before the accident, he had seen implements cross started at John Deere dealerships. His only attempt at cross starting involved a swather, not a tractor. A swather is a self-propelled machine that cuts hay and puts the hay in a wind row. Prior to August 22, 1989, the day of the accident, petitioner attempted to start a John Deere swather by cross starting it. He was at a

John Deere dealership to purchase the swather. The dealers could not start the swather. They were trying to help petitioner get it started when he attempted to cross start it. He attempted to cross start it by trial and error because he did not know how to cross start it. He knew that if metal touched the solenoid, that the swather could start. He hit between the two solenoid posts. The swather did not start but lunged forward. Petitioner did not know if the swather was in gear at the time. He did not know that the swather would take off when cross started.

Petitioner testified that had seen a tractor cross started by the employees at a John Deere dealership. When he saw a tractor cross started, the tractor did not move. He did not know if the tractor which was cross started was in gear at the time.

The Owner's Manual for the subject tractor did not warn of the dangers of cross starting or bypass starting. The Owner's Manual only warned to disconnect the battery cables on any occasion during which the electrical system is the focus of repair or maintenance in an effort to avoid "risk of burns, shocks, or damage to components," and warned against attempting to start or operate the equipment if not at the operator's station, but did not describe the danger.

ARGUMENT

A. INTRODUCTION

The principal purpose of the summary judgment procedure is to isolate and dispose of meritless litigation. *Burden v. U.S. Army Corps of Engineers*, 794 F. Supp. 184 (S.D.W.Va. 1992). In ruling on a motion for summary judgment, the district court must simply decide whether there is a genuine issue of fact which must be resolved by a jury or whether evidence is so one-sided that the moving party must prevail as a matter of law. *Groff v. Continental Ins. Co.*, 741 F. Supp. 541 (E.D. Pa. 1990). The function of the district court is to determine whether there are genuine issues for trial while resolving all ambiguities and doubtful inferences against the moving party. *Ercole v. K/S Difko, XLIII Kodif KLIII A.p.S.*, 793 F. Supp. 61 (E.D.N.Y. 1992).

This Honorable Court should accept certiorari and expressly limit the district court from reaching conclusory inferences in favor of the party moving for summary judgment based solely upon the discovery deposition testimony of the nonmoving party, particularly with respect to the nonmoving party's knowledge of a fact. The district court should be limited in drawing inferences from the testimony of the nonmoving party during a discovery deposition against the deponent party without the benefit of other evidence to support the inference. Every person is entitled to his day in court if issues of fact are present to send the case to the jury. To use conclusory inferences drawn from a party's own deposition testimony as the sole basis for rendering judgment against him is inconsistent with the principles behind the summary judgment procedure and borders on the court weighing the evidence.

B. UNDER THE GENERAL PRINCIPLES GOVERNING SUMMARY JUDGMENTS, THE DISTRICT COURT SHOULD NOT BE ABLE TO REACH CONCLUSORY INFERENCES DRAWN FROM A NONMOVING PARTY'S OWN DEPOSITION TESTIMONY WHICH FAVOR THE PARTY MOVING FOR SUMMARY JUDGMENT.

Summary judgment is a harsh remedy that should be granted only when the moving party has established his right to judgment with such clarity as not to give rise to controversy. *United Food and Commercial Workers Union Local No. 88, AFL-CIO, CLC v. Middendorf Meat Co.*, 794 F. Supp. 328 (E.D. Mo. 1992). The district court is obligated to construe the facts in a light most favorable to the nonmoving party when ruling on a motion for summary judgment. *Board of Education v. Pico*, 457 U.S. 853 (1982). The court may not weigh evidence or determine the truth of any matter. *Mills v. Mills*, 790 F. Supp. 172 (S.D. Ohio 1992).

The district court must also indulge every reasonable inference from the facts in favor of the nonmovant. *Powers v. Nassau Development Corp.*, 753 F.2d 457 (5th Cir. 1985). Even if basic facts are not disputed, summary judgment is inappropriate when contradictory inferences may be drawn from the facts. *Dayton Hudson Corp. v. Macerich Real Estate Co.*, 812 F.2d 1319 (10th Cir. 1987).

In order to be successful on a manufacturer's products liability claim, a plaintiff must prove that (i) the product was the cause of the injury; (ii) the defect was in the product at the time it left the manufacturer's possession and control; and, (iii) the defect made the product

unreasonably dangerous to the consumer. *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1366 (Okla. 1974). Failure to warn may in itself be a defect within a product. *Barber v. General Electric Co.*, 648 F.2d 1272 (10th Cir. 1981).

Petitioner's deposition testimony and inferences drawn therefrom raised the following issues of material fact which should have been decided by a jury: 1) whether the tractor was the cause of petitioner's injuries or whether his own actions were the cause of his injuries, 2) whether the tractor was defective at the time it left the manufacturer's possession and control or whether the tractor merely had a broken part which petitioner failed to replace prior to using the tractor, 3) whether the tractor was unreasonably dangerous to petitioner or whether petitioner could have avoided the danger by replacing the broken bolt prior to using the tractor, 4) whether petitioner was aware of the dangers of cross starting equipment, 5) whether respondent had a duty to warn petitioner or whether respondent had no duty to warn petitioner because petitioner was a sophisticated user of the tractor, and 6) if respondent did have a duty to warn petitioner, whether the Operator's Manual was adequate in its warnings. The district court herein erred in failing to follow the standards of the summary judgment procedure under Rule 56 of the Federal Rules of Civil Procedure by construing the facts and drawing inferences in favor of respondent, the moving party, and granting summary judgment in its favor.

Respondent set forth a statement of facts in its Brief in Support of Motion for Summary Judgment which were based upon petitioner's own deposition testimony, yet

were conclusory inferences construed in favor of respondent. Petitioner did not attempt to raise genuine issues of fact by contradicting his deposition testimony. While Local Rule 14(b) of the Rules for the Western District of Oklahoma requires a nonmoving party to controvert specifically numbered facts set forth by the moving party when opposing a motion for summary judgment, petitioner did not controvert his own deposition testimony with specifically numbered paragraphs. Through his Brief in Opposition, petitioners did, however, identify in argument, genuine issues of material fact evident from the conflicting inferences to be made from his testimony.

The district court accepted the facts presented by respondent as the "undisputed" facts for purposes of ruling on respondent's motion because petitioners' response brief did not contain specifically numbered controverted facts. The district court erred in doing so by failing to recognize that the "undisputed" facts presented by respondent contained inferences which respondent derived in its favor and which the petitioners clearly disputed as set forth in their response brief. The district court ignored the case law interpretation of Rule 56 of the Federal Rules of Civil Procedure which states that genuine issues of material fact can be created by conflicting inferences derived from undisputed facts. *Dayton Hudson Corp. v. Macerich Real Estate Co.*, 812 F. 2d 1319 (10th Cir. 1987).

The district court is required to examine the merits of a motion for summary judgment even though the nonmoving party fails to object to the motion. *Freund v. Fleetwood Enterprises, Inc.*, 756 F. Supp. 604 (D. Me. 1991). Summary judgment must be denied, even if no opposing

evidence is presented by the nonmovant, if the evidence in support of the motion for summary judgment does not by itself establish the absence of a genuine issue of material fact. *Van Poyck v. Dugger*, 779 F. Supp. 571 (M.D. Fla. 1991).

The district also erred in granting summary judgment in favor of respondent based upon the respondent's inferences as to petitioner's knowledge of the alleged defect in the tractor. Where resolution of a dispositive issue necessitates an inquiry into one's state of mind, the court should be cautious in granting a motion for summary judgment. *Ross v. Wal-Mart Stores, Inc.*, 730 F. Supp. 357 (D. Kan. 1990). For example, cases which turn on a finding of intent are generally not appropriate for summary judgment because resolution of that issue depends on the credibility of witnesses as determined by the trier of fact after observation of witnesses; demeanor during direct and cross-examination. *Tenax Corp. v. Tensar Corp.*, 743 F. Supp. 1204 (D. Md. 1990). Similarly, questions involving whether a party knew or should have known of a particular condition are generally factual issues inappropriate for resolution by summary judgment. *Braxton-Secret v. A.H. Robins Co.*, 769 F.2d 528 (9th Cir. 1985), citing 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* Sections 2729-2730 at 229, 238 (2d ed. 1983). While the issues involving a person's state of mind can become questions of law when the salient facts are undisputed, summary judgment should not be granted where contradictory inferences may be drawn from such facts, even if undisputed. *Id.* at 531.

Petitioner agrees that the words contained in his deposition testimony were stated by him, but disagrees

that the inferences drawn by respondent against him should be taken as undisputed facts barring any genuine issue of material fact. A comparison of the exact wording of petitioner's deposition testimony to respondent's inferences summed up in its own version of the facts reveals genuine issues of material fact for which the district court should have denied the motion for summary judgment.

This is particularly shown when the issue is whether the petitioner assumed the risk. Assumption of the risk of a known defect is an affirmative defense in a manufacturers' products liability action. *Jordan v. General Motors Co.*, 590 P.2d 193 (Okla. 1979). Whether evidence as to knowledge by petitioner is equivalent to knowledge of a known defect and thus an assumption of the risk of a known defect is for the jury to decide. *Id.* at 196. Where evidence is such that reasonable men might differ on the question of whether petitioner's awareness of a defect and continued use of the product was the proximate cause of petitioner's injury, then the assumption of risk defense is a question for the jury. *Id.* If petitioner is attempting to avoid summary judgment, he need only show that evidence presented in the motion is subject to conflicting interpretations of such a nature that reasonable men might differ as to its significance. *Hawkins v. Larrance Tank Corp.*, 555 P.2d 91 (Okla. App. 1976).

C. EXISTING FEDERAL CASE LAW INTERPRETING THE SUMMARY JUDGMENT STANDARD.

This Court has previously stated the general principles underlying the summary judgment procedure that

inferences are in the province of the jury and that inferences are to be viewed in favor of the party opposing a motion for summary judgment. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Honorable Court reviewed a court of appeals decision wherein it held that the heightened evidentiary requirements that apply to proof of actual malice in a New York Times case did not need to be considered for the purpose of a motion for summary judgment. In that case, this Court stated that the drawing of inferences from the facts is a function of the jury, not the court, as follows:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a direct verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

Id. at 255.

In *Adickes v. Kress & Co.*, 398 U.S. 144 (1970), this Honorable Court reversed the granting of a motion for summary judgment because the inferences to be drawn from the facts had to be viewed in the light most favorable to the party opposing the motion. *Id.* at 158. The petitioner in the case was a white school teacher who was refused service in respondent's lunchroom when she was accompanied by six Negro students, and who was arrested for vagrancy by the police when she left the respondent's premises. One of her claims was that the refusal of service and the arrest were the product of a

conspiracy between respondent and the police. This Court held in part, as follows:

> If a policeman were present, we think it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a *Kress* employee had a "meeting of the minds" and thus reached an understanding that petitioner should be refused service. Because "[o]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion," *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), we think respondent's failure to show there was no policeman in the store requires reversal.

Id. at 158-159.

The district court decisions appear to show an inconsistency between these general principles. In *United Indus. Corp. v. Nuclear Corp. of America*, 43 F.R.D. 30 (D.C.N.Y. 1967), the court held that a judge may not draw fact inferences when ruling on a motion for summary judgment, which is consistent with *Anderson v. Liberty Lobby, Inc., supra.* Yet courts have held that factual inferences should be viewed in the light most favorable to the nonmoving party. *Harsha v. U.S.*, 590 F.2d 884 (10th Cir. 1979). Specifically, the district court for the District of Columbia has held that if inferences drawn would preclude a judgment for the moving party, then a genuine issue of material fact exists and summary judgment must be denied, which is consistent with *Adickes v. Kress & Co., supra. Franklin Nat. Bank v. Krakow*, 295 F. Supp. 910 (D.C.D.C. 1969). Clearly conflicting inferences cannot be

resolved on a motion for summary judgment. *Savarin Corp. v. National Bank of Pakistan*, 290 F. Supp. 285 (S.D.N.Y. 1968). So the issue remains with respect to when a district court is able to draw the inference that must be viewed in the light most favorable to the non-moving party.

In the instant case, the factual inferences at issue were drawn by the respondent, the party moving for summary judgment, from petitioner's deposition testimony, and were proposed as undisputed facts supported by the deposition record. The district court accepted the inferences as undisputed facts and granted summary judgment in favor of respondent. Petitioners take the position that the district court should not have accepted the inferences as undisputed facts which favored the nonmoving party because the court was required to view any inferences drawn from facts in a light favorable to petitioner and the inferences were not supported by any evidence other than the petitioner's own testimony. An opposing party can always draw its own conclusory inferences from deposition testimony, but the district court should not rely on them in granting a motion for summary judgment, but should only consider them as tending to show a factual issue which precludes summary judgment.

CONCLUSION

This Honorable Court is respectfully petitioned to address the district court's ability to make conclusory inferences against the nonmoving party solely from the deposition testimony of the nonmoving party when ruling on a motion for summary judgment.

The Court is further requested to find that the district court erred in granting the respondent's motion for summary judgment and that the summary judgment must be reversed.

Respectfully submitted,

SANDRA L. TOLLIVER
Substitute Counsel on behalf of
MORRIS & MORRIS
1616 South Denver
Tulsa, Oklahoma 74119
(918) 587-5514

Attorneys for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STEVEN R. HOLLAND and GLENNYSS E. HOLLAND, husband and wife, Plaintiffs-Appellants, v. JOHN DEERE CO., a Delaware corporation; FOUR COUNTY TRACTOR EQUIPMENT CO., a Texas corporation; DEERE & COMPANY, Defendants-Appellees.	No. 92-6288 (D.C. No. CIV-91-977-C) (W.D. Okla.) (Filed June 28, 1993)

ORDER AND JUDGMENT*

Before BALDOCK and KELLY, Circuit Judges, and BENSON,** District Judge.***

---

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** Honorable Dee V. Benson, District Judge, United States District Court for the District of Utah, sitting by designation.

*** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiffs-appellants Steven R. and Glennyss E. Holland appeal from a judgment dismissing their products liability action.[1] The issues are whether genuine issues of material fact exist precluding summary judgment; whether the district court erred in granting summary judgment sua sponte to defendants-appellees John Deere Co. and Deere & Co. (the Deere defendants); and whether the district court abused its discretion in denying plaintiffs' Fed. R. Civ. P. 59(e) motion and their motion for an enlargement of time to file an affidavit in support of that motion. We decide all issues adversely to plaintiffs and affirm.

This diversity action arose out of an accident involving a farm tractor manufactured by the Deere defendants and sold to plaintiffs by defendant-appellee Four County Tractor Equipment Co. Plaintiffs alleged that while plaintiff Steven Holland was standing beside the tractor checking its electrical system, the tractor suddenly and without warning spontaneously started and ran over him, causing serious injuries. Plaintiffs further alleged that the tractor was defective and unreasonably dangerous in its design and manufacture; that the defect was the proximate cause of Steven Holland's injuries; and that defendants failed to adequately warn plaintiffs of the defect.

---

[1] We construe the notice of appeal as properly seeking review of the May 20, 1992, judgment dismissing the action, as well as the July 29, 1992, denial of the Fed. R. Civ. P. 59(e) motion, although the notice of appeal only identified the latter order, as the appeal is otherwise proper, the intent to appeal from the final judgment is clear, and the opposing parties were not misled or prejudiced. *See Grubb v. FDIC*, 868 F.2d 1151, 1154 n.4 (10th Cir. 1989).

Four County Tractor moved for summary judgment, identifying ten allegedly undisputed material facts. It attached portions of Steven Holland's deposition and the tractor's operator's manual in support thereof. In pertinent part these facts are as follows: Steven Holland's injuries were caused when the tractor started while in gear as a result of his working on its electrical system with a pair of metal pliers while standing on the ground. It was his practice to always read the owner's manual of any equipment he owned. During his lifetime, he has owned or operated at least twelve tractors, has extensive knowledge of agricultural equipment, and is capable of performing small repairs and maintenance on such vehicles. He performs ninety percent of the repairs on his equipment. He knew before the accident that one must exercise caution in maintaining and working on tractors, and that placing any type of metal near the solenoid could result in electrical current arcing over, causing the tractor to start. He had previously attempted to start a swather[2] while in gear by touching metal to the starter solenoid, and had observed the swather start to lunge and spin.

Further undisputed facts are that on the day of the accident, Steven Holland was having difficulties with the top starter solenoid bolt. He started the tractor that morning by standing on the ground and holding battery cables and other wire connections into the stub of the top bolt. Later that day, when the tractor again would not start, he assumed the problem was with the bottom solenoid bolt.

---

[2] A swather is a self-propelled machine that cuts hay down and puts it in a wind row. Aplt's App. Vol. I at 78.

He attempted to determine what the problem was by reaching in near the solenoid with a pair of metal pliers. On the two other occasions when he had replaced the starter solenoid bolts he had disengaged the battery before removing the solenoid. He knew that touching metal to a starter solenoid could start the vehicle and create a potentially dangerous situation. He also knew it was a safe practice to always disconnect the battery cable when working on the tractor's electrical system. He was working on the electrical system when the accident occurred. Aplt's App. Vol. I at 40-43. Also undisputed was that Steven Holland left the key in the ignition when he left the operator's station, *Id.* at 88, and was not sure if he checked to see that the tractor was out of gear, *Id.* at 89.

Plaintiffs' only submission in opposition to the motion was a brief in which they argued that Steven Holland did not disconnect the battery cables at the time of the accident because he was checking to see if electrical current was reaching specific points on the tractor; that it was not his understanding that the tractor could start from the ground while in gear; and that the issues were for a jury to decide.

Based on the ten undisputed facts, the district court determined that the tractor was not defective, but if it was, Steven Holland voluntarily assumed the risk of a known defect. It further concluded that there was no duty to warn because Steven Holland was aware of the alleged hazard, but if there was a duty to warn, the operator's manual contained adequate warnings. The district court granted Four County Tractor's motion for summary judgment, then granted summary judgment sua

sponte to the Deere defendants because its conclusions applied equally to them.

We review an order granting summary judgment de novo, applying the same legal standard used by the district court to evaluate the motion under Fed. R. Civ. P. 56(c). *Applied Genetics Int'l. Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 56(c). Summary judgment should be granted unless a "fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). This determination must be made viewing the evidence "through the prism of the substantive evidentiary burden." *Id.* at 254.

In a diversity action, we apply the law of the forum, *Skidmore, Owings & Merrill v. Canada Life Assurance Co.*, 907 F.2d 1026, 1027 (10th Cir. 1990). Oklahoma's law applies in this case. Oklahoma adopted the doctrine of manufacturers' products liability in *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1362 (Okla. 1974). Plaintiff must prove three elements to recover under this doctrine: 1) the product was the cause of the injury; 2) a defect existed in the product at the time it left the manufacturer's or retailer's possession and control, depending on who is the defendant; and 3) the defect made the product unreasonably dangerous to the plaintiff. *Id.* at 1363.

"A product is not defective when it is safe for normal handling and consumption. . . . " *Duane v. Oklahoma Gas & Elec. Co.*, 833 P.2d 284, 286 (Okla. 1992). A product may be

defective because of manufacturing or supplier flaws, defective design, or failure to warn of dangers. *Mayberry v. Akron Rubber Mach. Corp.*, 483 F. Supp. 407, 412 (N.D. Okla. 1979). Plaintiffs alleged that the tractor was defective in its design and manufacture. They identified this defect as its ability to be "bypass started"[3] while in gear.

Plaintiffs' only evidence of a design or manufacturing defect was the fact that an accident occurred. We upheld a directed verdict for a manufacturer in a products liability case where the plaintiff presented no expert testimony or other evidence proving a defective design, other than the product itself and the fact that an accident occurred. *Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 848.49 (10th Cir. 1979). We noted that an accident does not raise a presumption, let alone prove, that a product contained a defect. *Id.* at 849. *See also Gates v. Ford Motor Co.*, 494 F.2d 458, 459 (10th Cir. 1974). "[A] manufacturer is under no duty to make products absolutely safe from every conceivable potential injury." *Kelley ex rel. Kelley v. Rival Mfg. Co.*, 704 F. Supp. 1039, 1044 (W.D. Okla. 1989). Plaintiffs produced no evidence from which a jury could find a manufacturing or design defect.[4]

---

[3] Bypass starting refers to a method whereby the normal starting circuitry is bypassed by placing a piece of metal between the terminals on the starter and the starter solenoid.

[4] While not essential elements of the plaintiff's case, *Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1457 (10th Cir. 1987), state-of-the-art evidence, or evidence of the feasibility of a safer design, can meet the plaintiff's burden of proving a defective design. *See Robinson v. Audi NSU Auto Union Aktiengesellschaft*, 739 F.2d 1481, 1486 (10th Cir. 1984); *Steele ex rel. Steele v. Daisy Mfg. Co.*, 743 P.2d 1107, 1109 (Okla. Ct. App. 1987). Expert testimony that

Plaintiffs also claim defendants failed to warn of the tractor's ability to be bypass started while in gear. A failure to warn itself may make a product defective. *Duane*, 833 P.2d at 286. A seller or manufacturer is required to warn of a danger which it has reason to anticipate may result from a particular use. *Id.* However, there is no duty to warn of a danger that is obvious or generally known, nor is there a duty to warn a knowledgeable user of the product. *Id.* The plaintiff has the burden of proving that the failure to warn was a proximate, producing cause of the injury. *Id.*

The undisputed facts establish that Steven Holland had extensive experience with tractors. He knew a tractor could be started by touching metal to a solenoid. Aplt's App. Vol. I at 92. He has observed that a swather started in this fashion "tried to take off." *Id.* He had started his tractor before the accident by standing on the ground and holding battery cables and wires onto the bolt stub on the starter solenoid cap, *id.* at 84-85, and therefore knew that the tractor could be started from that position.

Plaintiffs contend that Steven Holland was unaware of the alleged defect because he testified that the tractor will not start without being in neutral or park. Taken out of context, this testimony might support their argument. However, the testimony was in response to the question whether the tractor would start if a driver was sitting in the seat, placed the key in the ignition, turned it, and nothing happened. Drawing inferences favorably to the

---

there was a design defect can also meet that burden. *See Brown v. McGraw-Edison Co.*, 736 F.2d 609, 615-16 (10th Cir. 1984).

party opposing summary judgment does not mean taking testimony out of context.

Even if there was a duty to warn and the warnings were inadequate, plaintiffs offered no evidence that this was a proximate, producing cause of the injury. *See Duane*, 833 P.2d at 286. It is undisputed that Steven Holland read the manual and was aware of the warnings it did contain, but disregarded them. We conclude that plaintiffs failed to show a genuine issue of material fact as to their products liability claim.

Plaintiffs next contend that the district court erred by granting summary judgment sua sponte to the Deere defendants. The Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986), held that district courts have the power to enter summary judgment sua sponte, as long as the losing party was on notice to come forward with all of his or her evidence. Plaintiffs claim this holding only allows summary judgment to be granted to a party against whom a motion for summary judgment has been filed but who failed to file a cross motion. We disagree. *Celotex Corp.* relied on 10A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2720 (1983). This text states at pp. 27-28 that a court has the power to grant summary judgment sua sponte to a party against whom a motion has been filed, as well as where there has been no motion, as long as the losing party had notice and an opportunity to respond.

Plaintiffs then argue that they did not have the requisite notice and opportunity to respond. Again we disagree. Their claim against Four County Tractor is identical to their claim against the Deere defendants.

They have never identified how their response to a motion by the Deere defendants would have differed from the response they did file.

Plaintiffs next contend that the district court abused its discretion by denying their Rule 59(e) motion to alter or amend the judgment. They identified for the first time in the reply to the response to the motion several allegedly disputed facts. The district court denied the motion because plaintiffs raised the arguments and evidence for the first time over sixty days after the court granted summary judgment. A Rule 59(e) motion is intended to correct manifest legal errors or present newly discovered evidence. *Committee for First Amendment v. Campbell,* 962 F.2d 1517, 1523 (10th Cir. 1992). We review the denial of the motion for abuse of discretion. *Buell v. Security Gen. Life Ins. Co.,* 987 F.2d 1467, 1472 (10th Cir. 1993). As the motion attempted to raise arguments for the first time, and there was no showing the evidence was newly discovered, we conclude the court acted within its discretion.

Finally, plaintiffs challenge the district court's denial of their motion for an enlargement of time to file the affidavit of their expert in support of their Rule 59(e) motion. The district court denied this request because the expert's opinion was formed months previously. We held in *Buell,* 987 F.2d at 1472, that when supplementing a Rule 59(e) motion with additional evidence, the moving party must show that the evidence is newly discovered and if it was available at the time of the challenged decision, counsel made a diligent yet unsuccessful effort to discover the evidence. Because plaintiffs failed to make this

showing, we find no abuse of discretion in the denial of an enlargement of time to file the affidavit.

The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

Entered for the Court

Bobby R. Baldock
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

STEVEN R. HOLLAND and GLENNYSS E. HOLLAND, husband and wife, Plaintiffs, v. JOHN DEERE CO., a Delaware corporation; and FOUR COUNTY TRACTOR EQUIPMENT CO., a Texas corporation, Defendants. v. DEERE & COMPANY, Additional Party Defendant.	No. CIV-91-977-C (Filed MAY 20, 1992)

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

At issue is defendant Four County Equipment Company's ("Four County") motion for summary judgment filed March 2, 1992. Plaintiffs Steven R. Holland and Glennyss E. Holland responded on April 6, 1992. Four County replied on April 8, 1992. On April 27, 1992, plaintiffs submitted a supplement pursuant to this Court's Order of April 23, 1992. This case is set on this Court's July 1992 jury trial docket. The subject cause of action is manufacturers' product liability, which sounds in strict liability in tort.

II. STATEMENT OF THE CASE

Plaintiffs allege that on or about August 22, 1989, plaintiff Steven R. Holland was working on a farm tractor manufactured by defendant John Deere Co., which had previously been sold to plaintiff by defendant Four County. Plaintiffs allege that while checking the electrical system and standing beside the Deere tractor, Model 4440, the tractor suddenly and without warning spontaneously started, causing the tractor to run over plaintiff, resulting in severe permanent and disabling injuries. Plaintiff Steven R. Holland alleges that the tractor was defective, unreasonably dangerous in its design and manufacture; that the alleged defects were the proximate cause of the injuries to plaintiff; that the defects made the product dangerous beyond that ordinarily contemplated by users of the equipment such as plaintiff; and that the defendants failed to warn the public or the plaintiff of the alleged defects.

Plaintiff Glennyss E. Holland alleges, as the wife of Steven R. Holland, that as a direct and proximate result of the alleged defective condition of the subject equipment, that plaintiff Glennyss E. Holland has been deprived of the marital services of her husband and further deprived of his support and comfort.

Plaintiffs collectively seek damages in excess of eleven million dollars ($11,000,000) and additionally seek punitive damages in excess of ten million dollars ($10,000,000).

III. STANDARD FOR SUMMARY JUDGMENT

The facts presented to the court upon a motion for summary judgment must be construed in a light most favorable to the nonmoving party. *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). If there can be but one reasonable conclusion as to the material facts, summary judgment is appropriate. Only genuine disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Finally, the movant must show entitlement to judgment as a matter of law. *Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir. 1985); Fed. R. Civ. P. 56(c).

Although the Court must view the facts and inferences drawn from the record in a light most favorable to the nonmoving party, "even under this standard there are cases where the evidence is so weak that the case does not raise a genuine issue of fact." *Burnette v. Dow Chem. Co.*, 849 F.2d 1269, 1273 (10th Cir. 1988). As stated by the Supreme Court, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1).

The Supreme Court articulated the standard to be used in summary judgment cases, emphasizing the "requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248

(emphasis in original). A dispute is "genuine" "if a reasonable jury could return a verdict for the nonmoving party." *Id.* The Court stated that the question is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. "The mere existence of a scintilla of evidence in support of the [party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [party]." *Id.* at 252. An appellate Court in reviewing a grant of summary judgment is " 'not limited to the grounds upon which the trial court relied but may base summary judgment on any proper grounds found in the record to permit conclusions of law.' " *Awbrey v. Pennzoil Co.*, ___ F.2d ___, ___ 1992 U.S. App. LEXIS 6622.6 (10th Cir. Mar. 1992) (quoting *City of Chanute, Kan. v. Williams Natural Gas Co.*, 955 F.2d 641, 647 (10th Cir. 1992) (citing *United States v. Colorado*, 872 F.2d 338, 339 (10th Cir. 1989))).

IV. UNDISPUTED FACTS

Rule 14(B) of the Western District of Oklahoma provides a framework for determining undisputed facts at the summary judgment stage. The Rule provides:

> The brief in support of a motion for summary judgment (or partial summary judgment) shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be numbered and shall refer with particularity to those portions of the record upon which movant relies. The brief in opposition to a

> motion for summary judgment (or partial summary judgment) shall begin with a section which contains a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.

W.D. Okla. R. 14(B).

A review of Four County Equipment Company's brief and Steven R. Holland and Glennyss E. Holland's response reveals that the following facts are undisputed within the meaning of Rule 14(B) for the purposes of this motion only:

1. On August 22, 1989, the plaintiff Steven R. Holland allegedly was injured while working on a tractor manufactured by defendant John Deere Co., and sold to him by defendant Four County.

2. Plaintiff's injuries were caused when the subject vehicle allegedly started while in gear as a result of plaintiff working on the vehicle's electrical system with a pair of metal pliers, while standing on the ground.

3. Plaintiff purchased the subject vehicle, the John Deere model 4440 tractor, from defendant Four County in 1981. It was the plaintiff's practice to always read the owner's manual of any equipment he owned.

4. Plaintiff, during his lifetime, has owned or operated at least twelve (12) different tractors. Plaintiff has extensive knowledge of agricultural equipment such as tractors and is capable of and experienced in performing small repairs and maintenance to such vehicles. Plaintiff performs approximately 90% of the repairs on his equipment.

5. Plaintiff knew and understood prior to the accident of August 22, 1989, that one must exercise caution in maintaining and working on tractors, and that placing any type of metal in close proximity to the solenoid could create the possibility of electrical current arcing over, causing the tractor to start. Plaintiff, on an occasion previous to the accident at issue in the instant suit, had attempted to start a self-propelled swather by touching metal to the starter solenoid. Plaintiff observed that the swather started to lunge and spin when it was started while in gear, thereby creating a potentially dangerous situation.

6. On the day of the accident, plaintiff had been experiencing difficulties with the top starter solenoid bolt. The bolt had broken months earlier, and apparently broke again on the morning of August 22, 1989. Plaintiff managed to start the subject tractor on the morning of August 22, 1989, by standing on the ground while holding battery cables and other wire connections onto the stub of the bolt on the top of the starter solenoid cap.

7. Just prior to the accident, the subject tractor would not start, and the plaintiff assumed that there was a problem with the bottom solenoid bolt. Plaintiff attempted to determine what the problem was with the

bolt by reaching in near the starter solenoid with a pair of metal pliers.

8. Plaintiff had replaced the starter solenoid bolts on the subject tractor on at least two separate occasions. On both of these occasions, plaintiff disengaged the battery before removing the starter solenoid from the subject tractor.

9. Plaintiff knew that touching metal to a starter solenoid could start the vehicle to which the solenoid was attached and create a potentially dangerous situation.

10. Plaintiff understood that it was a safe practice to always disconnect the battery cable when working on the electrical system of a tractor. Plaintiff acknowledged that he was working on the electrical system of the tractor at the time of the subject accident.

Four County's brief at 2-5 (Mar. 2, 1992); Steven R. Holland and Glennyss E. Holland's response brief at 2 (Apr. 6, 1992).

V. ANALYSIS

In order to recover on a claim for manufacturers' products liability, the "plaintiff not only must prove that there actually was a defect in the product, but also must show that the defect caused the particular injury in question." *Kelley ex rel. Kelley v. Rival Mfg. Co.*, 704 F. Supp. 1039, 1044 (W.D. Okla. 1989) (emphasis omitted). The plaintiff has the burden to prove by a preponderance of the evidence that the injury was caused by the product, the product was defective at the time it left the manufacturer's and seller's possession and control, and the defect

made the product unreasonably dangerous. *Berry v. Eckhardt Porsche Audi, Inc.*, 578 P.2d 1195, 1196 (Okla. 1978); *see also Kirkland v. GMC*, 521 P.2d 1353, 1364, 1366 (Okla. 1974) (causation of the injury by the defective product must be shown beyond a mere possibility and the burden on the plaintiff is a large and heavy one).

Plaintiff alleges that he was severely disabled due to a defective and unreasonably dangerous tractor that started when he was standing beside it. Plaintiff "bypass started" the engine while it was in gear, and was consequently run over by the back tires.

After carefully reviewing the record, the Court concludes that plaintiffs' claims that the tractor was defective, unreasonably dangerous in its design and manufacture, and plaintiff Steven Holland was not warned of these conditions are without merit under the circumstances of this case. Four County has shown that Steven Holland is a sophisticated user of the tractor and knew of the dangers of starting a tractor from a position other than the operator's station while the tractor is in gear. Holland stated in his deposition that the tractor would not start without being in neutral or park, but in that context he was obviously talking about starting the tractor by way of the keyed ignition, rather than through bypass starting. This conclusion is reinforced by the fact that plaintiff read the instruction manual that repeatedly warned him of the dangers of starting the tractor in a manner other than from the operator's station and by his previous experience with farm equipment.

It is undisputed in this case that plaintiff knew and understood, prior to the accident of August 22, 1989, that

he needed to exercise caution in maintaining and working on tractors, and that placing any type of metal in close proximity to the solenoid could create the possibility of electrical current arcing causing the tractor to start. Plaintiff, on an occasion previous to the accident, had attempted to start a self-propelled swather by touching metal to the starter solenoid. Plaintiff observed the swather start to lunge and spin when it was started while in gear, thereby creating a potentially dangerous situation. Plaintiff had replaced the starter solenoid bolts on the subject tractor on at least two separate occasions. On both of these prior occasions, plaintiff disengaged the battery before removing the starter solenoid from the subject tractor. In particular, plaintiff does not dispute that he knew that touching metal to the starter solenoid could start the vehicle to which the solenoid was attached and create a potentially dangerous situation. The Court does not believe that the tractor was defective, but even if it was, then plaintiff Steven Holland voluntarily and unreasonably encountered the known danger and thus voluntarily assumed the risk of a known defect. *See Kirkland v. GMC*, 521 P.2d at 1366-68; *cf. McMurray v. Deere & Co.*, 858 F.2d 1436, 1440 (10th Cir. 1988) ("Here, there was no evidence whatsoever, direct or circumstantial, that decedent knew of the alleged defect in the tractor: that it could be bypass started while in gear."); *Hogue v. A.B. Chance Co.*, 592 P.2d 973, 974 (Okla. 1979) (plaintiff did not assume risk of known defect by not wearing insulated gloves while touching electrical line because he thought the boom and basket in which he was standing were insulated).

There is no manufacturers' liability under these circumstances. Plaintiffs' claims that the tractor was defective and that the tractor was unreasonably dangerous in its design and manufacture must fail. There also was no duty to warn of the alleged hazard because Holland was well aware of it. A manufacturer is held responsible only when the product is less safe than expected by the ordinary consumer. A manufacturer is not required to produce a fail-safe product and there is no duty to warn of an obvious and known danger. *Floyd v. Sears, Roebuck & Co.*, No. CIV-85-2449-B, 1986 WESTLAW 22362.3-4 (W.D. Okla. Dec. 22, 1986). As a sophisticated user of farm machinery, plaintiff Steven Holland was well aware of the dangers of bypass starting such equipment, and therefore the tractor was not unreasonably dangerous.

Even if there was a duty to warn of the danger, which under the circumstances of this case there was not, then the Operator's Manual was totally adequate. The Manual expressly warned the operator to "[n]ever attempt to start or operate the tractor except from the operator's station." Four County's brief at Ex. B, p. 5 (Mar. 2, 1992). The Manual also warned the operator to "[d]isconnect the battery ground cable before working on the electrical system or working in any area where you might accidentally contact electrical components. This avoids risk of burns, shocks, or damage to the electrical components." *Id.* at 6, 9. It is undisputed that plaintiff acknowledged that he was working on the electrical system of the tractor at the time of the subject accident. There are also two triangular warning symbols in the Operator's Manual with exclamation marks within the triangles along with larger than normal bold type that reads "CAUTION",

which warns that the transmission should always be placed in park when the tractor is stopped or dismounted. *Id.* at 7, 8. The warning also alerts the operator that "[i]f the engine must be run while servicing equipment, [then] disconnect three-wire multiple connector in wiring to power front-wheel drive control valves located just behind front axle." *Id.* at 8. Holland read the Manual, but then totally disregarded the warnings to his peril. *See Kirkland v. GMC*, 521 P.2d at 1366.

A party resisting a motion for summary judgment must do more than make conclusionary allegations, it "must set forth facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Dart Indus. v. Plunkett Co.*, 704 F.2d 496, 498 (10th Cir. 1983); *see Lake Hefner Open Space Alliance v. Dole*, 871 F.2d 943, 945-46 (10th Cir. 1989) (Plaintiff did not "by affidavits or as otherwise . . . set forth specific facts showing that there is a genuine issue for trial.") (emphasis supplied).

"The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Advisory Committee Note to Fed. R. Civ. P. 56(e)). Fed. R. Civ. P. 56(e) provides in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there

> is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Id.; see also W.D. Okla. R. 14(B) (quoted above). When "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is 'no genuine issue for trial[,]' " and summary judgment can be granted. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 587 (citation omitted).

The burden on the moving party is to only point out that the record does not disclose a genuine issue on any material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 327. It is sufficient to discharge the moving party's burden by showing the record does not contain a material issue and point out the part of the record supporting the assertion. *Id.* at 322. Where, as here, the nonmoving party has the burden of proving at trial the material issue, then the moving party need not "support its motion with affidavits or other similar materials negating the opponent's claim." *Id.* at 323. It is enough to show "that there is an absence of evidence to support the non-moving party's case." *Id.* at 325.

Once the moving party points out the absence of evidence in the record creating a "genuine issue" about a "material fact," which the non-moving party bears the burden of proof at trial, the Supreme Court imposes a burden on the non-moving party. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 586. The non-moving party must set forth specific facts showing

there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248.

The Court determines whether the nonmovant has submitted evidence of the essential elements of the claim by viewing "the evidence presented through the prism of the substantive evidentiary burden" so that a reasonable factfinder could find for the nonmovant. *Id.* at 254. The Court is only required to draw reasonable inferences from the evidence. *See Lucas v. Dover Corp., Norris Div.*, 857 F.2d 1397, 1400 (10th Cir. 1988) (JNOV standard). Implausible inferences can be rejected. *Cf. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. at 585-98 (rejecting implausible inference of intent in antitrust conspiracy).

Viewing all of the inferences from the evidence in a light most favorable to Holland, the Court finds that no rational trier of fact could find liability for the claims that the tractor was defective or unreasonably dangerous under the facts peculiar to this case. Starting a farm tractor with no one in the operator's seat is obviously dangerous, and the dangers of bypass-starting farm equipment were well known to Holland. In the case of the sophisticated user, a plaintiff must prove that the warning that reached him was not only inadequate, "but also that the manufacturer had no reason to believe that its customer would realize the dangers of the product." *See Terry v. Senoret Chem. Co.*, No. CIV-87-561-R, slip op. at 6 (W.D. Okla. Nov. 8, 1989) (Russell, J.). Holland cannot meet this burden. Manufacturers and suppliers do not have a duty to make tractors accident-free, and they are not automatically subjected to strict liability because their

products are not as safe as possible. *See Nettles v. Electrolux Motor AB*, 784 F.2d 1574, 1578 (11th Cir. 1986) (liability may attach only if the absence of some safety feature fails to meet the reasonable expectations of ordinary consumers as to its safety); *Kelley ex rel. Kelley v. Rival Mfg. Co.*, 704 F. Supp. at 1045. It is indeed tragic when anyone is severely injured and permanently disabled, but here the blame for the accident cannot be traced to the manufacturer or seller. Similarly, the hazards and carnage of automobile accidents are well known, but manufacturers are not required to install air bags even though it is commonly known that they are an invaluable safety device in the event of head-on collisions. Summary judgment must be entered for Four County on all claims. Moreover, because the loss of consortium claim is derivative, then summary judgment must be granted to Four County on that claim as well.

VI. CONCLUSION

Accordingly, the Court finds that summary judgment should be **GRANTED** to defendant Four County Equipment Company. Because the conclusions of this Order apply equally to defendants John Deere & Company and Deere & Company, then summary judgment is **GRANTED** to them sua sponte. *See Celotex Corp. v. Catrett*, 477 U.S. at 326; *Pueblo of Santa Ana v. Mountain States Tel. & Tel. Co.*, 734 F.2d 1402, 1408 (10th Cir. 1984), *rev'd on other grounds*, 472 U.S. 237 (1985). The Court has separately entered a final entry of judgment consistent with this Order. This case is **STRICKEN** from this Court's July 1992 jury docket.

Four County has requested its costs and fees. Costs are to be separately applied for through the Court Clerk. See W.D. Okla. R. 6(E). No authority is offered for awarding fees, and that request is therefore **DENIED.**

IT IS SO ORDERED THIS 20 DAY OF MAY 1992.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

STEVEN R. HOLLAND and GLENNYSS E. HOLLAND, husband and wife,	)	No. CIV-91-977-C
Plaintiffs,	)	(Filed May 20, 1992)
v.	)	
JOHN DEERE CO., a Delaware corporation; and FOUR COUNTY TRACTOR EQUIPMENT CO., a Texas corporation,	)	
Defendants.	)	
v.	)	
DEERE & COMPANY,	)	
Additional Party Defendant.	)	

JUDGMENT

In a separate Order the Court found entitlement to summary judgment for defendants Four County Tractor Equipment Company, John Deere Company, and Deere & Company.

IT IS THEREFORE ORDERED that judgment is entered on behalf of defendant Four County Tractor Equipment Company, John Deere Company, and Deere & Company.

DATED THIS 20 DAY OF MAY 1992.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES
DISTRICT JUDGE
ENTERED IN
JUDGMENT 5-20-92

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

STEVEN R. HOLLAND and GLENNYSS E. HOLLAND, husband and wife,	)	
Plaintiffs,	)	No. CIV-91-977-C
v.	)	(Filed July 29, 1992)
JOHN DEERE CO., a Delaware corporation; and FOUR COUNTY TRACTOR EQUIPMENT CO., a Texas corporation,	)	
Defendants.	)	

ORDER

Before the Court is plaintiffs Steven R. Holland and Glennyss E. Holland's application to file an affidavit out of time. Plaintiffs have inartfully attempted to develop their response to summary judgment in a piecemeal and untimely manner. If the Court were to permit such an ungainly practice then what would develop would be the never ending motion for summary judgment which would impose an intolerable toll on the just, speedy, and inexpensive determination of the actions before this Court. *See* Fed. R. Civ. P. 1. It is plaintiffs' burden to follow the Federal Rules of Civil Procedure, and there are times, such as this one, when the parties are bound by the actions of their counsel. Plaintiffs have shown no just cause why the affidavit, admittedly based on the opinion of an expert formed months ago, was not filed when it

was highly appropriate to do so. *See* Fed. R. Civ. P. 56(e). Therefore, plaintiffs' application to file an affidavit out of time is DENIED.

Also, before the Court is plaintiffs' motion for new trial or in the alternative for reconsideration of this Court's Order of May 20, 1992. After carefully reviewing the filings, the Court finds no just cause to grant the motion for reconsideration or for new trial. In a *reply* brief filed over sixty days after this Court entered judgment for defendants, plaintiffs attempt to raise new arguments and bring new evidence to the Court's attention. Counsel for plaintiffs concedes that the arguments and evidence should have been raised and proffered months ago, and pleads that the parties should not suffer for the failings of counsel. The Court will simply not consider the untimely proferred evidence or arguments under the circumstances existing in this case. There must be some finality to the Court's Orders and, all things considered, the parties are bound under the circumstances of this case to the actions taken by their counsel. The Court must also take into consideration defendants' interests in distancing themselves from unmeritorious lawsuits and holding their costs to a minimum.

Accordingly, plaintiffs Steven R. Holland and Glennyss E. Holland's motion for new trial or to reconsider is DENIED.

IT IS SO ORDERED THIS 29 DAY OF JULY 1992.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES
DISTRICT JUDGE